On the receiving end

Receivers & possession: Cecily Crampin & Tricia Hemans suggest looking past the agency device

IN BRIEF

▶ *Menon and Menon v Menon and Menon*: can one sue oneself?

If tasked with running the argument that no man can sue himself, one might think oneself onto a winner. Surely it must be an irresistible submission that Mr and Mrs X could not possibly bring proceedings against Mr and Mrs X? However, when one factors in the Law of Property Act 1925, a mortgage and the appointment of receivers, one finds that such a submission may well get short shrift from the courts. This was the outcome of *Menon and Menon* (acting by Pask and Goode as joint fixed charge receivers) v *Menon and Menon*, 10 December 2018 (The County Court at Central London Unreported) where an argument that the Menons could not effectively sue themselves failed.

Typical

The case was typical of those involving receivers. The Menons were the registered proprietors of a west London property worth in the region of £5m. The Menons had charged the property as security for the repayment of sums advanced, pursuant to two facility letters. The term of those facilities expired and the sums advanced fell due. Pursuant to the terms of the charge, the lender appointed fixed charge receivers who sought to take possession of the property. The proceedings were brought by the receivers in the name of the borrowers and so, seemingly, the borrowers were suing themselves. By the time the matter came to be heard there were only two issues, one of which was whether because the receivers were agents for the mortgagors (having regard to both the common law, statute and the provisions of the charge) they could not effectively sue themselves (ie in their principals' names) for possession of the property.

Section 109(2) of LPA 1925 contains provisions dealing with the power to carry out certain acts in the name of the borrower or the lender. It provides that:

'A receiver appointed under the powers conferred by this Act … shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides.'

Sub-s (3) provides: 'The receiver shall have power to demand and recover all of the income of which he's appointed receiver by action or under s 72 of the Tribunals, Courts and Enforcement Act 2007, commercial renter's recovery or otherwise in the name either of the mortgagor or the mortgagee to the full extent of the estate or interest which the mortgagor could dispose of and to give effectual receipts accordingly for the same and to exercise any powers which may have been delegated to him by the mortgagee pursuant to this Act.'

As is typical, the charge in this case included provisions conferring additional powers on the receivers to take possession of and generally manage the property, as well as take, continue or defend any proceedings and do acts incidental to those powers.

It was argued on behalf of the Menons that the receivers could not bring valid possession proceedings in the name of the borrowers themselves as they were the agents of the borrowers. Citing an unreported Chancery Division case *Patternor v Bean* [2002] and a footnote from the new textbook, *Mortgage Receivership Law and Practice* [at 10.178 footnote 149], authored by Tozer and Crampin, it was said that an agent cannot [sue] their principal in the name of the principal, both as a matter of logic and case law. The Menons argued that the role of the receiver as agent of the mortgagor militated against such a conclusion and that it was illogical for agents to be able to sue their own principal for possession of a property which the principal owns and is prima facie in possession of.

Attractive

This would at first blush appear to be a very attractive argument. The defendants are not wrongly in possession as against themselves. They own the property. Furthermore, it goes against the grain to assert that the receivers' right to possession, exercised on the borrowers' behalf, is better than the actual rights to possession of the borrowers themselves.

However, the agency which is created by s 109(2) is often the subject of much confusion. In *Edenwest Ltd v CMS Cameron McKenna (A Firm)* [2012] EWHC 1258 (Ch), [2012] All ER (D) 136 (May) [at 61] it was said that 'although that description is commonplace and in the context technically

correct it is apt to give a somewhat false impression'. Traditional agency creates a fiduciary relationship between the agent and the principal. The principal will have either expressly or impliedly manifested assent that the agent should act on his behalf so as to affect his relations with third parties. In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties. However, under the 1925 Act and the terms of most legal charges, it is the lender that appoints the receiver and yet the receiver is the agent of the borrower. Arguably, the borrower has assented to the appointment of the receiver in advance, as such rights were created as a matter of contract when the charge was executed.

Ousting

It should be noted that having a limited or qualified right is not an absolute barrier to possession. Since the Judicature Acts of 1873 and 1875, it has been clear that an action for the recovery of land will not be defeated merely for want of legal estate. For example, an equitable mortgagee may be awarded possession by the courts (see for example *Barclays Bank v Bird* [1954] Ch. 274, [1954] 1 All ER 449) as he has the same rights as if he had a legal mortgage. The courts have even gone so far as to award possession to a licensee against a trespasser in order to give effect to the licensee's rights of occupation under the contract with the licensor (see for example *Manchester Airport Plc v Dutton* [2000] QB 133, [1999] 2 All ER 675). Another more common example of this principle in action is where a freeholder grants a tenancy. The tenant has a limited right to possession for the duration of the tenancy. Despite having a limited right, that tenant can oust the landlord who holds a freehold estate in the land. So much so that the landlord could be excluded from the property and the tenant could bring a claim for possession if the landlord refuses to go.

In a similar way, the receiver has a limited right but it is a right sufficient to oust the registered proprietor in circumstances where he has charged the property and agreed in advance to a receiver being able to exercise certain powers over it where certain pre-conditions have been met. Essentially, the right of the borrower to possession of the property is postponed to the right of the receivers to exercise control over the property. In *Menon*, His Honour Judge Dight put it this way: 'Section 109 of the Law of Property Act 1925 … in effect does two things: first, it provides the receivers with the right to gather in the rents and profits of the property in respect of which they have been appointed—it is the essence of that right that they can do so without their right to recover that money for the mortgagee's benefit being interfered with by the mortgagors themselves.

> *"If tasked with running the argument that no man can sue himself one might think oneself onto a winner"*

Therefore, even though the principal's right to recover the rents and profits and the title to recover the rents and profits lies in the mortgagors' hands, the mortgagors cannot themselves advance that title to prevent the receiver appointed under the charge from recovering those very monies… In other words, the right to the money remains with the true owners but the true owners will be restrained because of their bargain from interfering with the people who they put ahead of them to collect the money in.'

He went on to acknowledge that the agency created by the 1925 Act: '… is not a real agency in the general sense but it is an agency which is created so as to protect the mortgagees from attacks by the mortgagors for the wrongful acts of the receivers.'

In his judgment, the borrowers would be restrained by the appointment of a receiver from exercising their right to possession in the face of a claim by the receivers to exercise that right to possession themselves. Indeed the thesis of Tozer and Crampin in *Mortgage Receivership Law and Practice* (at 10.178) is that a receiver with suitable powers can obtain possession from the borrower. Theirs is a view supported by Lady Justice Arden's judgment in *McDonald v McDonald* [2014] EWCA Civ 1049, [2015] 1 All ER 1041 where receivers were held to have the power to serve notices under s 21 of the Housing Act 1988 (this point was not overruled on appeal to the Supreme Court). By parity of reasoning, those receivers would have been able to take possession of the property in that case. It must surely be the case therefore, that receivers are entitled to take all reasonable steps in discharging their duties.

Comment

In practice, the question of when receivers can take possession, particularly when bringing a claim in reliance on the borrower's (rather than the lender's) powers, comes up time and time again. *Menon* was decided in the county court and therefore we still await authority on the point it decided. The defendants have however, obtained permission to appeal so practitioners may not need to wait much longer for full guidance on this issue. **NLJ**

Cecily Crampin & **Tricia Hemans,** Falcon Chambers (*www.falcon-chambers.com*).